

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment)	AMENDED NOTICE OF PUBLIC
of ARM 17.30.1303, 17.30.1304,)	HEARING ON PROPOSED
17.30.1310, 17.30.1322,)	AMENDMENT
17.30.1330, 17.30.1341 and)	
17.30.1343 pertaining to)	(WATER QUALITY)
concentrated animal feeding)	
operations (CAFOs) and)	
adoption of Department)	
Circular DEQ-9 (Montana)	
Technical Standards for CAFOs))	

TO: All Concerned Persons

1. On December 16, 2004, the Board of Environmental Review published MAR Notice No. 17-222 regarding a notice of public hearing on the proposed amendment of the above-stated rules at page 2962, 2004 Montana Administrative Register, issue number 24. The public comment period closed on February 4, 2005. On June 16, 2005, the Board published an amended notice of proposed amendment on the above-stated rules at page 864, 2005 Montana Administrative Register, issue number 11, to provide a six-month extension of time for the Board to take final action in this rulemaking.

2. On November 17, 2005, at 9:30 a.m. the Board of Environmental Review will hold a public hearing in Room 35, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules, as modified in this notice. All comments that were received during the public comment period for MAR Notice No. 17-222 will be retained as part of the record, and commentors will not be required to resubmit those comments for them to be considered by the Board.

3. This amended notice of public hearing is being published to provide the public an opportunity to comment on the amendments proposed in MAR Notice No. 17-222 as that proposal is being modified by this notice. MAR Notice No. 17-222 proposed to amend Montana's water quality discharge permit regulations for concentrated animal feeding operations (CAFOs). The proposed amendments update the Board's CAFO rules by adopting new federal CAFO requirements promulgated in 2003 by the U.S. Environmental Protection Agency (EPA), by adopting a Department CAFO guidance circular (DEQ-9) as required by the federal rules, and by making other minor changes to the state CAFO rules.

In February of 2005, after the Board had held the public hearing for MAR Notice No. 17-222, a federal court vacated some of the provisions in EPA's 2003 CAFO rulemaking. The court vacated the provisions that: (a) allowed permitting authorities to issue permits without reviewing the terms of nutrient management plans; (b) allowed permitting authorities to issue

permits that did not include the terms of the nutrient management plans and that did not provide for adequate public participation; and (c) required CAFOs to apply for discharge permits or otherwise demonstrate that they have no potential to discharge. Waterkeeper Alliance, et al., v. USEPA, 399 F.3d 486, 524 (2d Cir. 2005).

In this amended notice the Board is proposing to go forward with the CAFO rule amendments as originally proposed in MAR Notice No. 17-222, except that the Board will not adopt those sections of the federal CAFO rules that were vacated by the federal court. In order to ensure that the new state CAFO rules do not contain any provisions vacated by the federal court, the Board is proposing to adopt the federal CAFO rules by reference, instead of publishing the full text of the rules in the state register, as originally proposed. As originally proposed in MAR Notice No. 17-222, the Board is again proposing to adopt Department Circular DEQ-9 and to make several minor corrections to the Board's CAFO rules.

The Board proposes to adopt, exactly as proposed in MAR Notice No. 17-222, minor changes to ARM 17.30.1304, 17.30.1310, and 17.30.1341. The Board proposes to amend ARM 17.30.1303, 17.30.1322, 17.30.1330, and 17.30.1343, as set out below, in order to adopt the federal CAFO rules by reference and to adopt Department Circular DEQ-9.

4. The rules proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

17.30.1303 INCORPORATIONS BY REFERENCE (1) and (2) remain the same.

(3) Where the department has adopted a federal regulation or statute by reference, the following shall apply:

(a) ~~References~~ references in the federal regulations to "administrator", "regional administrator", "director", or "U.S. environmental protection agency", or the like, should be read to mean "department";

(b) ~~Where~~ where the department incorporates by reference a subpart of a federal regulation, both the subpart and its constituent sections and subsections are also incorporated by reference.

(4) All of the incorporations by reference of federal agency regulations listed in the table in (7) ~~of this rule~~ shall refer to federal agency regulations as they have been codified in the July 1, 1991, edition of Title 33 and 40 of the Code of Federal Regulations (CFR), unless another codification date is specified.

(5) and (6) remain the same.

(7) The list of incorporations by reference follows:

<u>ARM 17.30....</u>	<u>33 CFR ...</u>	<u>Description of Regulation</u>
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(a) through (i) remain the same.

<u>ARM 17.30....</u>	<u>40 CFR ...</u>
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(j) 1330 ~~Appendix B of Part 122 Part 412 (July 1, 2004 edition)~~ Criteria for determining whether a facility or operation merits classification as a concentrated animal feeding operation (CAFO) point source category effluent limitations and guidelines.

(k) through (at) remain the same.

ARM 17.30.... Clean Water Act

(au) 1322	<u>40 CFR 122.21(i) (1) (July 1, 2004 edition)</u>	<u>Application requirements for concentrated animal feeding operations (CAFOs).</u>
(av) 1330	<u>40 CFR 122.23 (July 1, 2004 edition)</u>	<u>Definitions and permit requirements for concentrated animal feeding operations (CAFOs).</u>
(aw) 1343	<u>40 CFR 122.42(e) (July 1, 2004 edition)</u>	<u>Additional conditions applicable to concentrated animal feeding operations (CAFOs).</u>

REASON: The proposed amendments to ARM 17.30.1303 would amend the rule as originally proposed in MAR Notice No. 17-222, except that the publication date for 40 CFR Part 412 is changed to refer to the 2004 edition instead of the 2003 edition of the CFR. The change does not have substantive effect, but is necessary to reflect the most recent edition of the CFR. The proposed amendments would also incorporate by reference the 2003 federal requirements for CAFOs in 40 CFR Part 122. Some of the provisions of the 2003 federal CAFO rules were vacated in 2005 by a federal court decision. Waterkeeper Alliance, et al., v. USEPA, 399 F.3d 486, 524 (2d Cir. 2005). The proposed incorporation by reference of the federal CAFO rules is intended to adopt all the provisions of the federal CAFO rules that were not vacated by the Waterkeeper decision. As stated in the reasons for MAR Notice No. 17-222, the adoption of the new federal CAFO requirements is necessary to prohibit the discharge of manure and other process wastewater pollutants to state waters, and to maintain the state's primacy for administering the federal Clean Water Act discharge permit program.

17.30.1322 APPLICATION FOR A PERMIT (1) through (8)(h) remain the same.

(9) New and existing ~~concentrated animal feeding operations CAFOs~~, (defined in ~~ARM 17.30.1304(3)~~) 17.30.1330, and concentrated aquatic animal production facilities, (defined in

ARM 17.30.1304(6) shall provide the following information to the department, using the application form provided by the department:

(a) ~~for concentrated animal feeding operations:~~ CAFOs, the information specified in ARM 17.30.1322(6)(a) through (f) and 40 CFR 122.21(i)(1), including a topographic map; and

~~(i) the type and number of animals in open confinement and housed under roof;~~

~~(ii) the number of acres used for confinement feeding; and~~

~~(iii) the design basis for the runoff diversion and control system, if one exists, including the number of acres of contributing drainage, the storage capacity, and the design safety factor;~~

(b) through (17)(i) remain the same.

REASON: The proposed amendments to ARM 17.30.1322 are substantively the same as those proposed in MAR Notice No. 17-222, except that the application requirements are incorporated by reference from the federal rules instead of being set out in the text of the state rules. The reference in (9) to ARM 17.30.1304(3) would be deleted because no definition of CAFO exists in that section. A proposed clause in (1) has been deleted because it implemented the "duty to apply" provisions that were vacated by the federal court. The use of the incorporation by reference method is necessary to ensure that, until EPA promulgates new rules in response to the Waterkeeper decision, the state CAFO rules will contain only those provisions of the federal CAFO rules that were not vacated by the federal court.

17.30.1330 CONCENTRATED ANIMAL FEEDING OPERATIONS

(1) "Concentrated animal feeding operation" (CAFO) means an animal feeding operation which meets the criteria in ~~Appendix B of 40 CFR Part 122.23~~, or which the department designates under (3) ~~of this rule~~. CAFOs that are required to obtain a permit shall either apply for an individual MPDES permit or submit an application for coverage under an MPDES CAFO general permit. A permit application for an individual permit or application for coverage under a general permit must include the information specified in ARM 17.30.1322(6)(a) through (f) and 40 CFR 122.21(i)(1), including a topographic map. If the department has not made a general permit available to the CAFO, the CAFO owner or operator shall submit an application for an individual permit to the department.

(2) and (3) remain the same.

(4) No animal feeding operation with less than the numbers of animals set forth in ~~Appendix B of 40 CFR Part 122.23~~ may be designated as a ~~concentrated animal feeding operation~~ CAFO unless:

(a) through (5) remain the same.

(6) The board ~~hereby~~ adopts and incorporates ~~herein~~ Appendix B of 40 CFR Part 122.23 (July 1, 2004 edition), which is ~~an appendix to~~ a federal agency rule setting forth criteria for determining whether a facility or operation merits

classification as a ~~concentrated animal feeding operation~~ CAFO. See ARM 17.30.1303 for ~~complete~~ additional information about all materials incorporated by reference.

REASON: The proposed amendments to ARM 17.30.1330 are substantively the same as those proposed in MAR Notice No. 17-222, except that the definitions and requirements applicable to CAFOs are incorporated by reference from the federal rules instead of being set out in the text of the state rules. See Reason for amendments to ARM 17.30.1322, above.

17.30.1343 ADDITIONAL CONDITIONS APPLICABLE TO SPECIFIC CATEGORIES OF MPDES PERMITS (1) The following conditions, in addition to those set forth in ARM 17.30.1342, apply to all MPDES permits within the categories specified below:

- (1) remains the same, but is renumbered (a).
- (a) remains the same, but is renumbered (i).
- (i) through (iv) remain the same, but are renumbered (A) through (D).
- (b) remains the same, but is renumbered (ii).
- (i) through (iv) remain the same, but are renumbered (A) through (D).
- (2) remains the same, but is renumbered (b).
- (a) through (c) remain the same, but are renumbered (i) through (iii).

(i) and (ii) remain the same, but are renumbered (A) and (B).

(c) All permits issued to concentrated animal feeding operations (CAFOs), in addition to meeting those requirements set forth in ARM 17.30.1322, 17.30.1330, 17.30.1341 and 17.30.1342 must include the requirements set out in 40 CFR 122.42(e). The design, monitoring, recordkeeping, reporting, and specifications for CAFOs must be prepared in accordance with and comply with the criteria set forth in the technical standards for nutrient management and effluent limit guidelines established in 40 CFR Part 412 and department Circular DEQ-9, "Montana Technical Standards for Concentrated Animal Feeding Operations".

(3) The board ~~hereby~~ adopts and incorporates ~~herein~~ by reference:

(a) 40 CFR 122.44(f), which is a federal agency rule setting forth "notification levels" for dischargers of pollutants that may be inserted in a permit upon a petition from the permittee or upon the initiative of the department;

(b) 40 CFR Part 412, which establishes the effluent limitation guidelines and best management practices for CAFOs; and

(c) department Circular DEQ-9, "Montana Technical Standards for Concentrated Animal Feeding Operations," 2005 edition.

(4) See ARM 17.30.1303 for ~~complete~~ additional information about all materials incorporated by reference. All material that is incorporated by reference may be obtained from the Department of Environmental Quality, P.O. Box 200901, Helena, MT 59620-0901.

REASON: The proposed amendments to ARM 17.30.1343 are substantively the same as those proposed in MAR Notice No. 17-222, except that the additional conditions applicable to CAFOs are incorporated by reference from the federal rules instead of being set out in the text of the state rules. See Reason for amendments to ARM 17.30.1322, above. The proposed amendments also adopt Department Circular DEQ-9, which contains technical standards for CAFOs. The statement of necessity for adoption of DEQ-9, as well as a summary of the provisions of DEQ-9, is set out in MAR Notice No. 17-222. Copies of proposed Department Circular DEQ-9 may be obtained by contacting Carrie Greeley, Water Protection Bureau, Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; by phone at (406) 444-0574; or at http://www.deq.mt.gov/ber/2005_Agendas/Sept_05/webagenda93005.pdf.

5. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board no later than 5:00 p.m., November 7, 2005, to advise us of the nature of the accommodation that you need. Please contact the Board Secretary at P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2544; fax (406) 444-4386; or email ber@mt.gov.

6. Concerned persons may submit their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to the Board of Environmental Review, P.O. Box 200901, Helena, Montana 59620-0901, faxed to (406) 444-4386 or emailed to the Board Secretary at ber@mt.gov and must be received no later than 5:00 p.m., November 25, 2005. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

7. Katherine Orr, attorney for the Board, or another attorney for the Agency Legal Services Bureau, has been designated to preside over and conduct the hearing.

8. The Board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supplies; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Such

written request may be mailed or delivered to the Board of Environmental Review, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, emailed to the Board Secretary at ber@mt.gov, or may be made by completing a request form at any rules hearing held by the Board.

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

James M. Madden

JAMES M. MADDEN

Rule Reviewer

By: Joseph W. Russell

JOSEPH W. RUSSELL, M.P.H.,

Chairman

Certified to the Secretary of State October 17, 2005.